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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 710

WILLIAM TRAVIS BLACKBURN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 723

ISAAC CALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam opinions of the court of appeals (No. 710, Pet. App.; No. 723, Pet. App.) are not yet reported.

JURISDICTION

The judgments of the court of appeals in No. 710 and No. 723 were entered on October 4, 1968 and October 10, 1968, respectively. The petition for a writ

of certiorari in No. 710 was filed on November 5, 1968 and is, thus, out of time under Rule 22-2 of the Rules of this Court. The petition for a writ of certiorari in No. 723 was filed on November 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The following questions are common to both No. 710 and No. 723:

1. Whether the evidence was sufficient to support the convictions.
2. Whether certain incidents during trial and remarks of government counsel in final argument were prejudicial.
3. Whether the court of appeals violated any right of petitioners' by deciding the appeal on the briefs without oral argument.

Petitioner Call (No. 723) presents the following additional question:

4. Whether it was error for the prosecutor to question character witnesses as to whether they were aware of petitioner Call's prior convictions for dealing in illegal whiskey.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Middle District of North Carolina of conspiring to violate the Internal Revenue laws of the United States relating to distilled spirits (R. I, 5-7; R. II, 239; R. II, 278-279). Petitioner

Blackburn was sentenced to imprisonment for a period of forty months and fined $1000 (R. I, 9; R. II, 279). Petitioner Call was sentenced to imprisonment for fifty-four months and fined $2500 (R. I, 10; R. II, 279). The court of appeals considered petitioners' appeals on the briefs without oral argument and affirmed the convictions.

The evidence at trial showed that in the latter part of May, 1967, petitioner Call visited John Dale Brooks at his home on route 1, Sparta, North Carolina, and had a conversation with Brooks about the establishment of a distilling operation (R. II, 41, 43, 45-46). Subsequently, both petitioners came to the Brooks property to examine the back dirt roads to determine safe routes for transporting whiskey from the proposed still site. On this occasion, Call told Brooks that Blackburn would handle delivery of the distilling equipment and the material for making whiskey (R. II, 47-48, 62). Over the next several weeks, seven stills with related equipment and a large volume of sugar were delivered to Brooks and placed into operation (R. II, 49-53). After the stills had been in operation about two weeks, Blackburn came to Brooks' place and was informed of the production schedule (R. II, 53). Blackburn said he "would send a man to pick it up" (R. II, 53). Thereafter, one Jimmy Martin, picked up a load of whiskey in a two-door foreign car (R. II, 53). On the next occasion, Blackburn accompanied Martin to Brooks' home to pick up the whiskey (R. II, 55-56).[1] Blackburn was

[1] This load of whiskey was returned to Brooks by Martin the next night because it was too weak (R. II, 57). Brooks

also with Martin on the third and last occasion he came to pick up whiskey (R. II, 57-59). That same night Blackburn returned to Brooks' home and told him that Martin had "set us up" and "[w]e can't bother him now, but * * * after the court's over * * * I'll get him to come up here to get some whiskey and you can kill him" (R. II, 59-60).

On the evening of July 13, 1967, Internal Revenue agents, acting on information from Martin, stationed themselves in a position to observe Call rendezvous with Blackburn (driving a Ford Thunderbird) and Martin (driving a black Volvo) at an intersection of a country road from the still site and a main highway. Call joined Blackburn in the Thunderbird (R. II, 97-100, 139). On July 15, 1967, agents received information that a black Volvo bearing a specified license would have a load of whiskey to be delivered in Winston-Salem and would be led by a 1963 Thunderbird bearing a specified license driven by Blackburn (R. II, 114-115, 120-123). From surveillance positions on the highway, agents observed the Thunderbird and Volvo about 4:30 a.m. and gave chase (R. II, 115-116, 123). The Volvo cut off the highway and was abandoned by the time the agents arrived. It contained 121 gallons of nontaxpaid whiskey (R. II, 116-117, 123-124). The Thunderbird was stopped and Blackburn and his wife were found to be the occupants (R. II, 117-118, 123-124).

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made it stronger by adding high proof whiskey and delivered it to Blackburn and Martin at the next pick up (R. II, 58-59).

ARGUMENT

1. The evidence was sufficient to support petitioners' convictions for conspiracy to violate the internal revenue laws. Even assuming defense counsel succeeded in developing minor inconsistencies in Brooks' testimony, resolution of the conflict was for the jury. On appeal, the evidence must be viewed in the light most favorable to the government. See *Glasser* v. *United States*, 315 U.S. 60.

2. Petitioners complain about several incidents during trial involving actions of the court, and remarks of government counsel in final argument.

a. Petitioners contend that they were prejudiced by a colloquy between petitioner Call's counsel and the court concerning an objection to Brooks' testimony about statements made to him by Call in the course of the conspiracy. The court asked Call's counsel the basis for his objection to these statements and if he were serious in objecting on the ground of "hearsay" (R. II, 45). Counsel said he was serious about the objection and probably had some law to support him "in the book here" (R. II, 46). The court overruled the objection without further comment. Neither counsel suggested at trial that the exchange had the slightest prejudicial effect.

b. When Jimmy Lee Martin, the informant in this case, was called as a witness, he refused to be sworn or to take the witness stand (R. II, 88-89). Martin gave no reason for the refusal. After it was clear that Martin would not testify, the court dis-

missed the jury at the request of government counsel (R. II, 90). Outside the presence of the jury, the court summarily held Martin in contempt of court for refusal to take the oath and at least start his testimony (R. II, 90-93). The court instructed the jury that the incident should not be considered by them in any way (R. II, 93-95). When the court asked counsel if there was any objection to the instruction, Blackburn's counsel responded that (R. II, 95).

> Your Honor I can't think of any. I thought it was very fair. Of course, none of us know what effect a matter like that has on the jury. The thing that passes through my mind is whether I should make a motion for my client. But as far as the instructions which the Court gave, just listening to it, I don't think of anything I could add to it.

There was no motion for a mistrial. Call's counsel also had no objection.

The government was obviously surprised at this turn of events involving its main witness since it required an early noon recess to continue with the presentation of its case (R. II, 93). Martin advanced no reason for his refusal to testify. In these circumstances the court was justified in summarily disposing of the contempt. Rule 42, F.R. Crim. P.; *Brown* v. *United States*, 356 U.S. 148. The matter was handled as expeditiously as possible and the jury appropriately instructed, to the satisfaction of counsel, to disregard the incident.

c. Government counsel in closing argument made the following remarks (R. II, 202-203, 205):

And why won't a co-conspirator testify? Ladies and gentlemen, the very fear of God is in them, not only for themselves, ladies and gentlemen, but because if they leave—most of them have wives and children; the house burns down and one of your own family is burned up, who is to say—

MR. MOORE: Your Honor, we object.

MR. SMITH: Your Honor, we object. That's prejudicial.

THE COURT: Objection sustained.

MR. WHITE [government counsel]: I will argue, ladies and gentlemen, that the testimony in this case is that William Travis Blackburn said that, "The Negro set us up. We can't do anything to him before he is tried, but after that I'll send him up again and you kill him." Draw any inference from that you will. Don't take my inference.

* * * *

MR. WHITE: Now, ladies and gentlemen, as to what defense these two defendants could have had, if there is anyone who could have aided their cause in this matter, they were at liberty to call them.

MR. MOORE: Your Honor, we object.

MR. SMITH: We object to this part. It's prejudicial.

THE COURT: Well, what you are talking about, the defendant has no obligation to introduce evidence and the defendant has no obligation to testify, and that is not to be held against him.

MR. SMITH: That's right.

THE COURT: I will instruct the jury on that point.

MR. WHITE: All right, sir.

Petitioners contend that they were prejudiced by this allegedly impermissible argument. However, no objection was or properly could be made to counsel's paraphrasing of Brooks' actual testimony concerning the threat to kill Martin and the suggestion that the jury draw any inference it desired. Counsel may make such legitimate comment on the evidence. See *White* v. *United States*, 394 F. 2d 49 (C.A. 9). The court sustained the objection to general comment on the fears of co-conspirators who testify at trial.

Government counsel's comment that petitioners were free to call witnesses who could aid their defense was not a comment on *their* failure to testify. The trier of fact is free to consider a defendant's failure to offer an innocent explanation of evidence which supports an inference of guilt. See *Wilson* v. *United States*, 162 U.S. 613; *Moore* v. *United States*, 271 F. 2d 564, 568 (C.A. 4). The court here made it clear at the time of the argument that defendants' failure to take the stand could not be held against them (R. II, 205) and so instructed the jury as a part of the formal charge (R. II, 233).

3. The court of appeals affirmed petitioners' convictions on the briefs without oral argument pursuant to Rule 7 of the Rules of the Court of Appeals for the Fourth Circuit (Supplementing the Federal Rules of Appellate Procedure) (No. 710, Pet. App. I).[2] Peti-

[2] The supplemental rules for the Fourth Circuit became effective on July 1, 1968, the same date as the Federal Rules of Appellate Procedure were implemented. Rule 7 provides in pertinent part:

[Footnote continued on page 9]

tioners do not have a constitutional right to "oral argument before an appellate court" (Pet. No. 710, 12-14; Pet. No. 723, 21-23). Nor is the court's action in disposing of the matter unfair. The issues were fully briefed by all parties on a complete record and were readily determinable on the record. The rule of the Fourth Circuit permitting disposition in appropriate cases without oral argument is undoubtedly bottomed on the heavy case load in that court. See *United States* v. *Gregg*, 393 F. 2d 722 (C.A. 4). It is consistent with the present appellate rules.

The prior Criminal Rules provided for dimissal of frivolous appeals on motion without oral argument. See Rule 39(a), F.R. Crim. P. (1966); *United States* v. *Gregg*, 393 F. 2d 722 (C.A. 4). That provision is carried over into Rule 27 of the Federal Rules of Appellate Procedure. See Advisory Committee's Notes, 43 F.R.D. 61, 145, 164. Rule 47 of the Appellate Rules empowers the courts of appeals to make

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[2] [Continued]

(a) In the interest of docket control and to expedite the final disposition of pending cases, the chief judge may, from time to time, designate a panel or panels to review any pending case at any time before argument for assignment or disposition under this rule. * * *

(b) If all of the judges of the panel to which a pending appeal has been referred conclude that the appeal is frivolous and entirely without merit, the appeal will be dismissed, or the judgment affirmed. * * * A pending appeal may be dismissed, or the judgment appealed from affirmed, reversed, or vacated, or other appropriate relief granted, before the filing of briefs or before oral argument. * * *

rules governing their practice not inconsistent with the Rules. The practice in the Fourth Circuit to decide appropriate cases on the briefs without oral argument is within the spirit of Rule 34(b) of the Appellate Rules that "the court may terminate the [oral] argument whenever in its judgment further argument is unnecessary." The courts of appeals are not foreclosed from adopting reasonable procedure for handling appeals without oral argument "[i]n the interest of docket control and to expedite the final disposition of pending cases." (See note 2, *supra.*)

4. Petitioner Call contends that the prosecutor wrongfully questioned his four "character" witnesses as to whether they were aware of his four prior convictions for dealing in illegal whiskey (No. 723, Pet. 13-21).[3] However, the substance of the testimony of

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[3] Classification of the witnesses as "character witnesses" was abandoned prior to instructions to the jury (R. II, 211-212).

> THE COURT: Before the United States Attorney started arguing, I asked Mr. Smith how he characterized the testimony that he introduced, would it be character testimony or what, and he said well, it was sort of borderline. I asked him if he wanted an instruction on character evidence, and he preferred so far as his client was concerned to just forget the whole thing of character evidence and talking about criminal records and so forth and leave it at that and give no instructions on any phase of that.
>
> Did I state your position correctly, Mr. Smith?
>
> MR. SMITH: Yes sir.
>
> MR. MOORE: I think it would be better off not to charge on that.
>
> THE COURT: Well, that's what he said he wanted me to do.

the witnesses, including petitioner Call's wife, concerning his legitimate business activities, his standing in the community and his family life was that Call was a prosperous farmer with no time for bootlegging (R. II, 164-173). It was legitimate impeachment to inquire into their knowledge that defendant had actually been convicted of being in the liquor business. See *Michelson* v. *United States*, 335 U.S. 469. As to one witness (Sabastian), defense counsel asked on direct "whether [petitioner Call] has a reputation for dealing with whiskey in his community there or not" (R. II, 170), to which the witness replied, "I don't know of it." The prosecutor was not permitted to inquire further into Sabastian's knowledge of previous convictions (R. II, 170). Petitioner Call's wife, after testifying to his business activities and family life (R. II, 171-172), stated on cross-examination that she could not say that Call had never discussed liquor transactions with her "because he has had four previous arrests" (R. II, 173).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

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